35305-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

ISMAEL TARANGO, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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# BRIEF OF RESPONDENT

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## I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in denying Tarango's motion to suppress.

2. Findings of Fact 4 and 5 are unsupported by substantial evidence.

3. Insufficient evidence supports the conviction as to Count No. 2.

## II. ISSUES PRESENTED

1. Whether Findings of Fact 4 and 5 are unsupported by substantial evidence?

2. Without regard to Findings of Fact 4 and 5, did the trial court err in denying Tarango's motion to suppress where the record reflects that law enforcement performed a valid *Terry*[1] stop?

3. If the trial court erred in concluding law enforcement validly stopped the defendant pursuant to *Terry*, is the defendant's identity subject to suppression such that Count 3, escape from community custody, must also be dismissed?

4. Whether sufficient evidence supports the conviction as to Count 2?

## III. STATEMENT OF THE CASE

Factual history.

On March 7, 2016, at approximately 2:00 p.m., Carlos Matthews had just finished work for the day, and went to the Bargain Giant store on Empire and Crestline in Spokane, Washington, to get dinner for his family. RP 36.[2] He pulled into the parking lot and parked next to a Suburban or

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1 *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

2 Unless otherwise indicated, the substantive facts of the case have been taken from the trial transcript by court reporter Weeks, from trial dates of 12/5/16 to 12/7/16.

Tahoe that was playing loud music. *Id*. The defendant, Ismael Tarango, was seated in the passenger seat of the car, "mean-mugging" Mr. Matthews. *Id*. As Mr. Matthews exited his car, he intended to say, "how [are] you doing" to the defendant, but upon looking into the car, he saw that the defendant had a gun in his hand, sitting on his right thigh. *Id*. Although Mr. Matthews was not originally intimidated by Mr. Tarango's appearance, once he looked down and saw the gun, "things, of course, changed."[3] RP 51. After observing the gun, Mr. Matthews became "pretty nervous," concerned that Mr. Tarango was going to rob someone or the store. RP 37.

Before entering the Bargain Giant, Mr. Matthews called 911, informing the dispatcher that there was a man in a Chevy Tahoe outside of the store with a gun in his hand. RP 39. Mr. Matthews then went inside the store to do his shopping, and took his time doing so because he did not "really want to go back out there until [he] knew the cops were out there." RP 39. While paying for his food, the defendant and a female walked into the store. The defendant looked at Mr. Matthews, and made a "shushing" gesture "to keep [him] quiet about what [he] had seen." RP 39.

Still nervous, Mr. Matthews paid for his food, walked outside "real quick" and returned to his car. RP 39-40. He drove around the block and

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[3] "I just kind of felt pretty intimidated at that point." RP 56.

parked his car so he could see the parking lot of the store, planning to follow the defendant until the police arrived. RP 40. Mr. Matthews observed a few police officers approach the Tahoe, but observed the Tahoe leave the parking stall, and drive west on Empire. RP 41. The police followed the Tahoe. *Id*. Wanting to ensure that the police "got the right guy," Mr. Matthews followed and observed police pull over the SUV. RP 42. The male detained by police was the same individual Mr. Matthews observed holding a gun in the Bargain Mart parking lot. *Id*.

Officer Brownlee testified that dispatch advised law enforcement of Mr. Matthews' call as "a report of somebody in a vehicle in a parking lot with a gun and a display of a gun." RP 69. Brownlee was not dispatched to investigate, but self-dispatched to assist. RP 70. He observed the vehicle, and after confirming the license plate to make sure he was following the correct vehicle, initiated a traffic stop. RP 71. Because the call involved a weapon, and the occupants of such a vehicle were a potential threat, he and other law enforcement officers conducted a "high risk stop." RP 72, 80. Officers identified the male passenger as Mr. Tarango. RP 73.

After the occupants of the vehicle were removed and secured, Brownlee approached the vehicle to ensure no other passengers remained. RP 87. Because Mr. Tarango was actively supervised by the Department of Corrections and had a DOC warrant for his arrest, DOC Officer Carpenter

responded to the scene, and, after being advised Mr. Tarango had been detained for "brandishing a weapon," DOC Officer Carpenter searched the area of the Tahoe in which Mr. Tarango had been seated.[4] RP 93-95, 112. He observed the grip of a firearm behind the passenger seat previously occupied by the defendant. RP 97. The gun was partially obscured by a canvas bag, and when Officer Carpenter moved the bag to confirm the presence of the gun, another firearm fell out of the bag. *Id*. The firearms were within reaching distance of the front passenger seat. RP 109. The DOC officer then terminated his search when police advised they would like to proceed with investigating new law violations. RP 110.

Detective Green sealed the vehicle, and had it towed to the police property facility. RP 149. Officer Brasch then authored an application for a search warrant for the Tahoe, which was ultimately granted. RP 215-16. During the execution of the search warrant, Brasch and other officers retrieved the two guns from the area immediately behind Mr. Tarango's seat. RP 237. One was a loaded Glock model 22 semi-automatic pistol and the other was a Colt Frontier Scout revolver. RP 237, 240, 242. Officer Brasch also located ammunition in each firearm, as well as boxed

[4] Officer Carpenter testified his goal in conducting the search was to determine whether the defendant had committed any additional violations of his supervision that needed to be addressed at a DOC violation hearing. RP 127.

ammunition of the same caliber behind the front passenger seat. RP 280-81, 283-84. Officer Brasch believed both firearms to be operable. RP 281, 285.

Procedural history.

On March 9, 2016, the State charged the defendant with two counts of first degree unlawful possession of a firearm, and one count of escape from community custody. CP 1-2.

On June 16, 2016, the defendant filed a motion to suppress evidence, alleging that the traffic stop was not justified by the "uncorroborated tip" that a man had a gun in his lap while parked outside a grocery store, and that the DOC search of the vehicle was also unlawful. CP 9-19. In support of his motion, the defendant attached multiple police reports and the CAD log. CP 20-34. The State responded, arguing the facts were sufficient to conduct a *Terry* stop, the informant was a reliable citizen informant, and that the owner of the vehicle gave consent to search; the State attached additional police reports to its response. CP 35-54. The defendant responded, arguing that the State had "included additional facts in its reply brief that were not known to the officers at the time of the stop. Officer Green's report indicates that he called the complainant after Mr. Tarango was detained and obtained additional facts that Mr. Tarango was "just weird, mean looking" and made a shushing gesture with his finger while in the grocery store." CP 56. Further, the defendant argued: "there is

no evidence in the record to indicate whether [Matthews] called police before or after he went into the store or what lead [sic] him to call the police." CP 57.

The Honorable Gregory Sypolt considered the motion on July 21, 2016. Wilkins 7/21/16 RP 1-19. The court did not direct either party to present testimony, and, instead, relied on the briefs and the police reports submitted by the parties. *Id.*; CP 74-76. The trial court denied the motion, finding Mr. Matthews to be a citizen informant, that police were "justified in stopping the SUV for investigatory purposes," and that "the driver gave police permission to search the vehicle which led to the discovery of the two firearms." CP 75 (Conclusions of Law 3, 6).

The matter proceeded to trial before the Honorable Raymond Clary on December 5, 2016. A jury found the defendant guilty on all three counts on December 12, 2016. Weeks RP 490-91; CP 153-55. On April 21, 2017, the trial court sentenced the defendant, who had an offender score of "7," to a prison-based drug offender sentencing alternative, with 39 months of confinement and 39 months of community custody on each count of unlawful possession of a firearm. CP 259-61. The trial court sentenced Mr. Tarango to 90 days of confinement for the charge of escape from community custody. CP 262. The defendant timely appealed.

## IV. ARGUMENT

### A. THE *TERRY* STOP CONDUCTED BY LAW ENFORCEMENT WAS LAWFULLY BASED UPON AN IDENTIFIED INFORMANT'S TIP.

1. Standard of review.

The court reviews a trial court's denial of a motion to suppress to determine whether substantial evidence supports the challenged findings of fact and whether these findings support the trial court's conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). The court reviews conclusions of law de novo. *Id*. at 214.

2. Challenged findings of fact.

The State agrees that defendant is correct that findings of fact 4 and 5 from the CrR 3.6 hearing *are* unsupported by substantial evidence, to the extent that the *trial* transcript clarifies that the identified informant, Mr. Matthews, called 911 to report Mr. Tarango to police before Mr. Tarango later "shushed" him inside of the Bargain Giant grocery store. RP 38-39. Because no live testimony was presented at the CrR 3.6 hearing, and because none of the police reports indicate that law enforcement knew of the "shushing" prior to stopping the vehicle in which Mr. Tarango was a passenger, it was error for the trial court to enter those findings.

However, if this court disregards the unsupported findings of fact in reviewing the legality of the stop of the defendant's vehicle, officers had

sufficient information from a named and known informant (as opposed to an anonymous informant), to conduct a *Terry* stop of the vehicle in which Mr. Tarango was a passenger. This court may affirm the trial court on any basis supported by the record below. *See, e.g., State v. Villareal*, 97 Wn. App. 636, 984 P.2d 1064 (1999).

3. The defendant was lawfully stopped pursuant to *Terry v. Ohio*.

Mr. Tarango alleges that he was seized in violation of the Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington Constitution when officers, relying on Mr. Matthews' report of a man with a gun sitting in a vehicle behind the Bargain Giant, detained Mr. Tarango to investigate the report.

When violations of both the federal and Washington State constitutions are alleged, it is appropriate to examine the State constitutional claim first. *Seattle v. Mesiani*, 110 Wn.2d 454, 456, 755 P.2d 775 (1988). This is because the federal constitution provides the minimum protection afforded to citizens against unreasonable searches and seizures, while the state constitution may afford greater protections. Thus, if the state constitution is satisfied, then the Federal Constitution is necessarily satisfied. *See, e.g., State v. Surge*, 160 Wn.2d 65, 83, 156 P.3d 208 (2007) (Owens, J. concurring).

Police violate neither the Fourth Amendment nor article 1, section 7, by conducting a brief *Terry* investigatory stop if they have "a reasonable and articulable suspicion that the individual is involved in criminal activity." *State v. Walker*, 66 Wn. App. 622, 626, 834 P.2d 41 (1992). A reasonable suspicion is the "substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

In *State v. Cardenas-Muratalla*, Division One outlined the analysis for determining whether law enforcement's conduct is a lawful *Terry* stop when that stop is based on an informant's tip.

> It is well established that a police officer does not need a warrant to conduct a *Terry* stop if it is based on "specific and articulable facts which, taken together with rational inferences from those facts," give rise to a reasonable suspicion of criminal activity. The officer must have some suspicion of a particular crime or a particular person, and some connection between the two. We have repeatedly stated that "articulable reasons" or "particularized suspicion" of criminal activity must be based on the police officer's assessment of the totality of circumstances with which he is faced. The officer's assessment must be such that in the officer's experience and knowledge, together with rational inferences drawn from those facts, reasonably warrant the limited intrusion upon an individual's freedom. The totality of circumstances test of *Illinois v. Gates* has replaced the two-pronged test of *Aguilar–Spinelli* in evaluating reasonable articulable suspicion taking into consideration both the quality and quantity of information known to the police. Under the "total circumstances" test, we consider "the particular circumstances facing the law enforcement officer" including the seriousness of the offense

> and any threat to public safety. The presence of a firearm in public alone is insufficient for an investigatory stop, but a report of actual or threatened use of a firearm can present a significant risk to public safety supporting an investigatory stop.

179 Wn. App. 307, 312-13, 319 P.3d 811 (2014).

Accordingly, "under the totality of the circumstances test, an informant's tip provides reasonable suspicion sufficient to justify an investigatory stop if it "possesses sufficient 'indicia of reliability.'" *State v. Marcum*, 149 Wn. App. 894, 903, 205 P.3d 969 (2009). To determine a tip's reliability, a reviewing court inquires whether there exist (1) circumstances suggesting the informant's reliability, or some corroborative observation which suggest either (2) the presence of criminal activity or (3) the informer's information was obtained in a reliable fashion. *Id*. at 904; *State v. Z.U.E.*, 183 Wn.2d 610, 618, 352 P.3d 796 (2015). "The existing standard does not require all three factors to establish indicia of reliability." *State v. Saggers*, 182 Wn. App. 832, 840 n. 18, 332 P.3d 1034 (2014). "[T]he existence of ... reasonable suspicion is determined based on an objective view of the known facts, and is not dependent upon the officer's subjective belief or upon the officer's ability to correctly articulate his or her suspicion in reference to a particular crime." *Z.U.E.*, 183 Wn.2d at 631 (Gordon McCloud, J. concurring). A reasonable suspicion can arise from information

that is less reliable than that required to establish probable cause. *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).

With regard to the reliability of an informant's tip to police, "[c]itizen informants are deemed presumptively reliable." *State v. Gaddy*, 152 Wn.2d 64, 73, 93 P.3d 872 (2004); *see also State v. Conner*, 58 Wn. App. 90, 96, 791 P.2d 261 (1990) ("We hold that ... a citizen informant reporting a crime can be inherently reliable for purposes of a *Terry* stop, even if calling on the telephone rather than speaking to the police in person"). "[A]n ordinary citizen who reports a crime which has been committed in his presence ... stands on much different ground than a police informer. He is a witness to criminal activity who acts with an intent to aid the police in law enforcement because of his concern for society or for his own safety." 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 3.4(a), at 208 (3d ed. 1996).

The police reports considered by the trial court in the CrR 3.6 motion include sufficient facts by which the trial court could conclude that, based on an objective view of the total circumstances presented, law enforcement officers were justified in conducting a *Terry* stop of the vehicle in which Mr. Tarango was an occupant.

Officer Green reported:

> On 3/7/2016 at about 1423 I was dispatched to a complaint of a suspicious person with a gun at 2103 E Empire. The complainant described a Brown Chevy Tahoe, occupied by a Hispanic male with a gun in his hand, sitting in the Tahoe behind the "Bargain Giant" store. I know there to be a high risk of robberies involving weapons at similar locations, and the risk to the public to be quite high in those cases.

CP 33.

Officer Voeller's report indicated that he:

> Responded to Crestline and Empire (Bargain Giant) in regards to a Person With a Weapon call. The complainant called in stating a male was sitting in vehicle with a handgun in his hand. When I arrived the vehicle … still parked in the parking lot on the east side of the building. Before Officers could make contact, the vehicle left westbound on Empire.

CP 43.

The CAD report (a report of dispatch activity) indicated: "Male with a handgun sitting in his vehicle behind the bargain giant … veh brn Chevy Tahoe, Lic # unk. H/M, 35 yrs. Seahawks Cap and Seahawks shirt. He only had the gun in his hand he did not raise the gun or display it. Comp. saw in males lap." CP 26. The CAD report also indicated Mr. Matthews left his name and telephone number with dispatch. CP 26.

Thus, the facts that police had at the time they stopped Mr. Tarango were: (1) Mr. Tarango was sitting in a vehicle; (2) the vehicle was "behind" the Bargain Giant store; (3) Mr. Tarango had a handgun in his hand;

(4) there was a high risk to the public of robberies of establishments such as the Bargain Giant, (5) the named complainant called 911 to report what he had seen and left his information. A reasonable inference that may be drawn from this last fact is that the complainant was concerned about Mr. Tarango's presence with a handgun in the parking lot of the Bargain Giant. From these facts, it can also be inferred that there was not an existing emergency which required the defendant to be armed at the time.

RCW 9.41.270(1) provides:

> It shall be unlawful for any person to carry, exhibit, display or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and a place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

This crime does not apply to acts committed by a person while in his or her place of abode or fixed place of business, or to law enforcement or military activities or to self-defense acts. RCW 9.41.270(3).

Thus, law enforcement was justified in stopping Mr. Tarango's vehicle upon Mr. Matthews report that Tarango was holding (carrying, exhibiting, or displaying) a firearm in a manner and at a time and place (holding the gun on his lap while in a vehicle outside of a grocery store) that warranted alarm for the safety of other persons (Matthews reported the

activity because he was alarmed by the circumstances).[5] Mr. Tarango was neither in his abode, nor in a fixed place of business.

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[5] After officers had detained Mr. Tarango, Officer Green contacted Mr. Matthews for additional information. Mr. Matthews told him:

> [He] went to the Bargain Giant store at 2103 E Empire. He parked in the parking lot on the east side of the building, next to a brown Chevy Tahoe. The Tahoe was parked on the east side of the building, facing west. As Carlos parked, he looked over and saw a male (Tarango) "staring at me from the passenger seat" of the Tahoe. There was a female in the driver's seat. Carlos got out of his car (which placed him right next to the passenger side of the Tahoe) and said "what's up". The male said "nothing much, bra". Carlos looked down into the Tahoe and saw the male had a gun in his right hand, lying across his lap. There was no visible holster, just the gun in his hand. Carlos described the gun as a semi-automatic handgun, "faded black", and thought it was on the smaller side, guessing perhaps a 9mm.
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> Carlos said the male did not make any threats, he was "just weird, mean looking." The male had a tattoo of lips on his right cheek, was wearing a Seattle Seahawks hat, a Seattle Seahawks shirt, and"maybe blue jeans, not sure", Carlos walked into the store. When he was cashing out, the male and female walked into the store. The male looked directly at Carlos and made a gesture with his finger as one would "shush" someone. (Described to me as a single finger to his lips, while looking straight at Carlos). The male "told me (Carlos) not in words to be quiet with his finger". At that point Carlos said he had not been specifically threatened, but was definitely concerned that something was wrong and that this male was trouble.
>
> Carlos left the store, went to his car, and drove away. Carlos intended to drive around the block and then follow the male if police had not arrived yet. As he did this, he saw officers pull up behind the store. Carlos saw the male and female pull away in the brown Tahoe. He followed and observed officers stop the vehicle. He had constant visual contact on the

Defendant relies on *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) and *Cardenas-Muratalla*, 179 Wn. App. at 309, for the proposition that "presence of a firearm in public without actual or threatened use, is insufficient to support an investigatory stop." Appellant's Br. at 11. These cases are not helpful to the defendant because neither case involved a defendant holding a firearm inside a vehicle while parked immediately outside a retail establishment.

*Cardenas-Muratalla* involved an *anonymous* tip of a man with a gun "in the area of Third Avenue and Yesler Way," at night, in a high drug, weapons and crime area, but did not indicate that anyone was threatened with the weapon. 179 Wn. App. at 310. Officers stopped the defendant, who matched the description of the individual provided by the anonymous informant, after observing the defendant "fluff" his sweatshirt with an "oh crap" look on his face. *Id*. The defendant did not follow law enforcement

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> vehicle from the moment it left the store until officers stopped the car. He did not see anything thrown or dropped from the vehicle, and no one got out of the car at any time after it left the store. He is certain that the car officers stopped and the two people in it are the same car and people he had called 911 to report. Carlos has never seen either the male or the female before, He has no association with them at all.

CP 33-34.

commands to stop. After officers then tased the defendant, they located a handgun in the defendant's waistband; the gun was not loaded and did not completely match the description given by the anonymous informant. *Id*.

Division One determined that neither the informant nor the informant's tip was reliable.

> The officers knew nothing about the 911 caller. The caller did not give his name, and the 911 operator was unable to reach the caller on a call-back. Further, the tip was not the report of any criminal activity. The informant said Cardenas–Muratalla showed him his gun, but that he (the informant) did not feel threatened. Carrying a firearm is a crime if it is carried or displayed in a manner that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons, or if it is willfully discharged in a place where there is a reasonable likelihood that humans, domestic animals, or property will be jeopardized. There is no evidence in the record that the 911 caller reported being intimidated or alarmed when the suspect showed him the gun or that the suspect discharged the gun or pointed it at anyone. In fact, the caller told the 911 operator, "He didn't threaten me. It's just that he showed me. I seen it.... Just calling to tell you, just calling to tell you." That is the only evidence in the record about the emotional state of the 911 caller or about Cardenas–Muratalla's actions that prompted the 911 call.

*Id*. at 316-17.

*Florida v. J.L*. presented even fewer facts; an anonymous caller reported a young black man at a bus stop carrying a gun. Officers responded to the location, and frisked the defendant, recovering a gun from his pocket. 529 U.S. 266.

Unfortunately, in this case, no live testimony was presented at the suppression hearing. The 911 recording was not played for the court. There is little information as to what Mr. Matthews *actually* told 911 regarding his emotional state, other than what is contained in the CAD report, the police reports, and what he subsequently testified to at trial. At the suppression hearing, the trial court considered the CAD report which indicated Mr. Matthews' name, telephone number, a detailed description of Mr. Tarango, and, importantly, what he had personally observed – Mr. Tarango sitting in a car, behind a grocery store, with a gun in his hand on his lap. These facts are sufficient to establish that the informant was reliable – and that his information was reliably obtained – by personally witnessing the defendant's concerning behavior.

Additionally, the court could infer that Mr. Matthews called 911 to report what he had seen because he was concerned for public safety. This inference is verified by Mr. Matthews' trial testimony that, although he was not originally intimated by Mr. Tarango's appearance, once he looked down and saw the gun, "things, of course, changed,"[6] RP 51, and after seeing the gun, Mr. Matthews was "pretty nervous," that Mr. Tarango was going to rob someone or the store, RP 37, and for this reason, he called 911.

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6 "I just kind of felt pretty intimidated at that point." RP 56.

Qualitatively, there must be a difference between a person walking down the street with a gun in a jurisdiction where it is not unlawful to openly carry a firearm, and a situation such as this, where a person sits with a gun in his lap, in the passenger seat of a vehicle behind a retail establishment in a high crime neighborhood. The latter would give any reasonably prudent law enforcement officer or citizen the concern that the firearm possessor was engaged in or was about to be engaged in unlawful conduct. Not only is the conduct a violation of RCW 9.41.270, but it also would justify a *Terry* stop based upon a reasonable concern that the defendant had already been or was currently involved in a robbery of the store. Although the trial court erred in entering certain findings of fact without substantial evidence in support, the trial court's conclusions of law were correct. Mr. Matthews was a reliable citizen informant and law enforcement conducted a valid *Terry* stop of the car in which he was a passenger.

4. Any unlawful seizure of the defendant does not invalidate his conviction for escape from community custody.

Other than to simply request that the court vacate his convictions, the defendant provides no argument that his conviction for escape from community custody is, in any way, affected by the allegedly unlawful detention that occurred, discussed above.

The State's power to prosecute a person is unaffected by the illegality of the means used to procure that person's attendance at trial. *Frisbie v. Collins*, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952) (affirming murder conviction where, without lawful authority, police kidnapped defendant and transported him to Michigan for trial); *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886) (federal agent abducted the defendant and forcibly brought him to Illinois to stand trial); *see also Mahon v. Justice*, 127 U.S. 700, 8 S.Ct. 1204, 32 L.Ed. 283 (1888).

Although the 'Ker–Frisbie' rule predates the exclusionary rule, it is not affected by it. *United States v. Crews*, 445 U.S. 463, 474, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980) (exclusionary rule does not prevent *prosecution* where a defendant's *presence at trial* resulted from unlawful arrest). This is because the *body or identity* of a person is not subject to suppression. *Immigration & Naturalization Serv. v. Lopez–Mendoza*, 468 U.S. 1032, 1039, 104 S.Ct. 3479, 82 L.Ed.2d 778, (1984) (rejecting the defendant's attempt to suppress his compelled presence at a deportation hearing).

Washington courts follow the 'Ker–Frisbie' rule. *State v. Bonds*, 98 Wn.2d 1, 14, 653 P.2d 1024 (1982) (unlawful warrantless arrest in Oregon did not invalidate later conviction of murder, rape and other charges), *cert. denied*, 464 U.S. 831, 104 S.Ct. 111, 78 L.Ed.2d 112 (1983);

*In re Davis v. Rhay*, 68 Wn.2d 496, 500, 413 P.2d 654 (1966) (unlawful extradition from New York to Seattle did not impair the State from prosecuting a defendant on outstanding charges).

Here, the defendant has failed to demonstrate that the State relied on any excludable evidence to convict him for escape from community custody. Each of the facts relied upon by the State to prove that charge existed before and independently of the allegedly unlawful identification and arrest of the defendant. Those fact were not tainted by the allegedly illegal arrest of the defendant for unlawful possession of a firearm, or the allegedly illegal *Terry* stop performed on the vehicle in which the defendant was a passenger. Thus, any error in the trial court's ruling on Mr. Tarango's suppression motion does not require reversal of the escape from community custody charge.

### B. SUFFICIENT EVIDENCE WAS PRESENTED FOR A JURY TO CONVICT THE DEFENDANT OF UNLAWFUL POSSESSION OF THE FIREARM THAT FELL FROM THE BAG SITUATED IMMEDIATELY BEHIND THE DEFENDANT'S SEAT.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged in a criminal case, *all* reasonable

inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. *Id*. A claim of insufficiency admits the truth of the state's evidence and all inferences that reasonably can be drawn therefrom. *Id*. In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

Our Supreme Court has stated:

> It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

*State v. Williams*, 96 Wn.2d 215, 222, 634 P.2d 868 (1981); *see, also, State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

To support a charge of first-degree unlawful possession of a firearm, the State must prove beyond a reasonable doubt that the defendant was

previously convicted in Washington of a serious offense and had a firearm in his possession or control. *See* RCW 9.41.040(1)(a). Possession of a firearm can mean actual possession or constructive possession. *State v. Manion*, 173 Wn. App. 610, 634, 295 P.3d 270 (2013). Actual possession means that the person charged had "personal custody" or "actual physical possession" of the firearm. *Id.* at 634. Actual possession may be proved by circumstantial evidence. *Id.* at 634. Constructive possession is established by showing the person charged has dominion and control over the item. *State v. Shumaker*, 142 Wn. App. 330, 174 P.3d 1214 (2007); *State v. Olivarez*, 63 Wn. App. 484, 820 P.2d 66 (1991). Dominion and control need not be exclusive in order to sustain a conviction for a crime requiring possession of a contraband item. *State v. Weiss*, 73 Wn.2d 372, 438 P.2d 610 (1968).

To determine whether a defendant was in constructive possession of an object, the court looks to the totality of the circumstances. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). Factors that may be considered in determining whether a defendant is in constructive possession include, among others, the ability to immediately reduce an object to actual possession. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

Here, the jury was instructed with WPIC 50.03. CP 147. It provides:

> Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.
>
> Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.
>
> In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

WPIC 50.03.

Here, there was sufficient evidence from which a rational jury could find the defendant guilty of first-degree unlawful possession of a firearm. First, the defendant stipulated to a conviction for a prior serious offense. CP 112; 137. However, defendant contends that the evidence demonstrates, at best, mere proximity to, passing control, or momentary handling of the gun that fell from the canvas bag when the DOC officer moved the bag to

better view the other firearm which was underneath the bag. Appellant's Br. at 15.

When viewed in the light most favorable to the State, the evidence presented at trial demonstrates more than mere proximity or passing or momentary control of the revolver. Two boxes of ammunition were also found in immediate area of the revolver and the pistol. One was ammunition for the pistol, which had been seen *in the defendant's hands* by Mr. Matthews, and the other was ammunition for the Colt revolver, recovered from the bag located in the passenger area immediately behind the defendant's seat and within his reaching distance. The State asked the jury to consider the "nexus" between the Glock and its ammunition, and the location of the Glock ammunition in relation to the revolver and its ammunition. Weeks RP 462. There is a logical nexus that the possessor of the pistol would also carry ammunition associated with that pistol. That ammunition was located in a bag containing the revolver and its ammunition.

Ms. Nickerson's testimony that she placed the guns in the backseat of the Tahoe is unhelpful to a sufficiency of the evidence inquiry, as the jury was free to disregard some or all of that testimony. *Williams*, 96 Wn.2d at 222 ("It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider"). If the jury did not believe

that Ms. Nickerson placed the guns in the backseat of the car, then it could reasonably believe that Mr. Tarango, who Mr. Matthews observed holding one gun, also possessed the revolver and the ammunition associated with both guns, all of which were ultimately located in the area immediately behind his seat, within his reach. Sufficient evidence was presented to convict the defendant of unlawful possession of the Colt revolver as charged in count 2.

## C. UNLESS THE DEFENDANT'S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT'S ORDER OF INDIGENCY WAS ENTERED, RAP 14.2 PROVIDES THAT THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT HER APPEAL.

Effective January 31, 2017, RAP 14.2 reads:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money

> owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A "nominal party" is one who is named but has no real interest in the controversy.

(Emphasis Added).

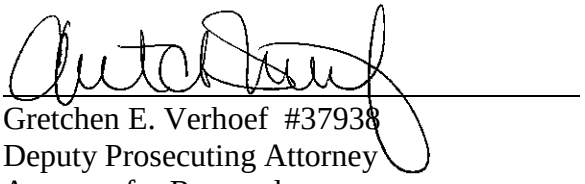
The trial court determined the defendant to be indigent for purposes of his appeal on June 16, 2017, based on a declaration provided by the defendant. CP 275-83. The State is unaware of any change in the defendant's circumstances. Should the defendant's appeal be unsuccessful, the Court should only impose appellate costs in conformity with RAP 14.2 as amended.

## V. CONCLUSION

The State respectfully requests this Court affirm the trial court and jury verdicts.

Dated this 30 day of January, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney



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Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br>v.<br><br>ISMAEL TARANGO,<br><br>Appellant, | NO. 35305-2-III<br><br>CERTIFICATE OF MAILING |

I certify under penalty of perjury under the laws of the State of Washington, that on January 30, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
andrea@2arrows.net

1/30/2018 **(Date)** Spokane, WA **(Place)** **(Signature)**

## SPOKANE COUNTY PROSECUTOR

## January 30, 2018 - 3:02 PM

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| **Appellate Court Case Number:** | 35305-2 |
| **Appellate Court Case Title:** | State of Washington v. Ismael M. Tarango |
| **Superior Court Case Number:** | 16-1-00923-0 |

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